(14)

No. 91-913

In the Supreme Court of the United States

OCTOBER TERM, 1991

JOHN R. PATTERSON, TRUSTEE, PETITIONER

v.

JOSEPH B. SHUMATE, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the anti-alienation provision of the Employee Retirement Income Security Act, which shields pension plans from claims of creditors, is enforceable in a bankruptcy proceeding.

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INTEREST OF THE UNITED STATES

Petitioner, the trustee of respondent's bankruptcy estate, seeks to include respondent's pension in the estate and distribute it to respondent's creditors. As mandated by ERISA, respondent's pension plan contains a provision prohibiting the assignment or alienation of pension benefits. Thus, the issue is whether ERISA's anti-alienation requirement is to be given force in determining what is included in a bankruptcy estate.

The Department of the Treasury and the Department of Labor have substantial authority for the enforcement of the terms of ERISA. The Secretary of the Treasury is charged with interpreting and administering ERISA's anti-alienation provision and has promulgated a regulation construing the anti-alienation requirement. 26

C.F.R. 1.401(a)-13. The Treasury, through the Internal Revenue Service, also is responsible for monitoring the tax-qualified status of pension plans, which may be affected by the assignment of plan benefits to bankruptcy trustees. In addition, the Secretary of Labor has authority to bring civil actions to ensure that fiduciaries of pension plans that are subject to ERISA comply with the terms of the Act, including the prohibition on alienation or assignment of plan benefits. 29 U.S.C. 1132(a)(5). The interpretation of ERISA's anti-alienation requirement therefore implicates basic ERISA policies that affect the agencies' enforcement of the Act.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent provisions of ERISA, the Bankruptcy Code, and the Internal Revenue Code, along with the IRS's anti-alienation regulation, are reprinted in the appendix to this brief.

STATEMENT

1. Coleman Furniture Corporation established a Pension Plan that satisfied all applicable requirements of the Employee Retirement Income Security Act of 1974 (ERISA) and qualified for favorable tax treatment under the Internal Revenue Code. In particular, the Pension Plan complied with Section 206(d)(1) of ERISA, 29 U.S.C. 1056(d)(1), which states that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." [1] Respondent Joseph B. Shumate, Jr., was associated with Coleman Furniture for more than 30 years. J.A. 14. After 1977, Shumate

[1] The Internal Revenue Code similarly provides as a general rule that "[a] trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits under the plan may not be assigned or alienated." 26 U.S.C. 401(a)(13).

controlled 96% of Coleman Furniture's stock and, from 1979 until early 1983, he served as president and chairman of the board of directors. J.A. 119-124. As an employee of Coleman Furniture, Shumate participated in the Pension Plan and his interest in the Plan has been valued at $250,000. J.A. 92-94.

Coleman Furniture experienced financial difficulties and, in November of 1982, the corporation filed a petition for relief under Chapter 11 of the Bankruptcy Code. The case soon was converted to a Chapter 7 proceeding and a trustee, Roy V. Creasy, was appointed. J.A. 13. Shumate then filed a Chapter 11 petition in his individual capacity in June of 1984, and his case also was converted to a Chapter 7 proceeding. Petitioner John R. Patterson was appointed as the trustee presiding over Shumate's personal bankruptcy. J.A. 18.

The trustee for the Coleman Furniture bankruptcy initiated an action in district court in which he sought and ultimately obtained approval to terminate the Pension Plan. See *Creasy* v. *Coleman Furniture Corp.*, 763 F.2d 656 (4th Cir. 1985). The trustee then proceeded to terminate and liquidate the Pension Plan, a process that was completed, for the most part, by the end of 1987. J.A. 8, 26-27. As a result, approximately 400 participants in the Pension Plan, except Shumate, received full termination distributions from Coleman Furniture's bankruptcy estate. Pet. App. 4a.

In April of 1987, petitioner, the trustee in Shumate's case, filed an action—referred to as a turnover action—to recover Shumate's pension benefits for his personal bankruptcy estate. J.A. 18-19.[2] The turnover proceeding was subsequently consolidated with a pre-existing action

[2] Because the scope of the bankruptcy estate is determined as of the time a bankruptcy petition is filed, 11 U.S.C. 541(a)(1), and the Pension Plan was not terminated until after Shumate filed his bankruptcy petition, whether Shumate's pension benefits are included in the bankruptcy estate is unaffected by the Plan's termination.

that Shumate had brought to compel Coleman Furniture's trustee to pay his interest in the Pension Plan to him. J.A. 7-10; Pet. App. 52a-57a. Shumate argued that his interest in the Pension Plan was excluded from his bankruptcy estate pursuant to 11 U.S.C. 541(c)(2), which excludes property that is subject to transfer restrictions that are enforceable under "applicable nonbankruptcy law." The "applicable nonbankruptcy law" on which Shumate relied was ERISA's anti-alienation provision.

Alternatively, Shumate maintained that even if his interest in the Plan was not excluded from the bankruptcy estate under Section 541(c)(2), he was entitled to an exemption for his pension benefits under 11 U.S.C. 522(b)(2)(A), which provides for the exemption of "any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law." Shumate again relied on ERISA's anti-alienation provision as the basis for his argument that his pension is "exempt under Federal law" within the meaning of Section 522(b)(2)(A).

2. The district court held that Shumate's interest in the Pension Plan was included in the bankruptcy estate under Section 541 and was not exempt under Section 522. Pet. App. 18a-46a. With respect to whether a pension is included in a bankruptcy estate, the court rejected Shumate's argument that ERISA constitutes "applicable nonbankruptcy law" under Section 541(c)(2). It instead agreed with those courts that have "interpreted the phrase 'nonbankruptcy law' to mean state law." Pet. App. 26a. The court accordingly turned to Virginia law and held that Shumate's interest did not qualify for protection as a spendthrift trust under Va. Code Ann. § 55-19 (Michie 1986) because Shumate had a controlling interest in Coleman Furniture. Pet. App. 36a-38a.

The district court then proceeded to reject respondent's alternative argument that his interest in the Plan was "exempt under Federal law" within the meaning of Section 522(b)(2)(A). Pet. App. 41a-45a. The court

reasoned that "the House and Senate reports contain a list of property that can be exempted under federal laws," that ERISA is "conspicuously absent" from that list, and that the federal laws mentioned related to interests that were "peculiarly federal in nature," while "ERISA regulates private employer pension systems." *Id.* at 44a, quoting *Lichstrahl* v. *Bankers Trust*, 750 F.2d 1488, 1491 (11th Cir. 1985). Accordingly, the court ordered that "Shumate's interest in the Coleman Furniture Corporation Pension Plan" be paid to the trustee of Shumate's bankruptcy estate. Pet. App. 54a.

3. The court of appeals reversed. Pet. App. 1a-17a. The court found that the terms of the Pension Plan included an anti-alienation clause as required by ERISA. The court therefore held, in accordance with its prior decision in *Anderson* v. *Raine (In re Moore)*, 907 F.2d 1476 (4th Cir. 1990), that Shumate's interest in the Pension Plan was excluded from his bankruptcy estate under Section 541(c)(2) of the Bankruptcy Code. Section 541(c)(2) honors transfer restrictions that are enforceable under "applicable nonbankruptcy law," and the court concluded that this language clearly encompasses ERISA: "'Applicable nonbankruptcy law' means precisely what it says: all laws, state and federal, under which a transfer restriction is enforceable. Nothing in the phrase 'applicable nonbankruptcy law' . . . suggests that the phrase refers exclusively to state law, much less to state spendthrift trust law." Pet. App. 7a-8a, quoting 907 F.2d at 1477.

The court further found that its "holding is consistent with the clear intent of ERISA and the Bankruptcy Code." Pet. App. 13a. Relying on this Court's precedents, the court of appeals reasoned that "Congress passed ERISA to guarantee that 'if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it.'" *Ibid.*, quoting *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980). The court of appeals also

relied on *Guidry* v. *Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365 (1990), where this Court held that ERISA's anti-alienation provision precluded a union from attaching a union official's pension benefits to recover money the official had embezzled from the union. Pet. App. 14a. The court therefore concluded that Shumate's pension account also should not be distributed among his debtors in bankruptcy proceedings, "because § 541 mandates that where trusts contain enforceable restrictions on transfer of a beneficial interest, those restrictions must be recognized in bankruptcy and there operate to exclude the interest from the debtor's estate." *Id.* at 15a. The court of appeals accordingly did not reach the question of whether Shumate's plan interest was exempt under Section 522.

SUMMARY OF ARGUMENT

There is no dispute that ERISA ordinarily forbids the trustee of a pension plan from conveying a beneficiary's interest in the plan to any creditor, even if *requested* to do so by the beneficiary. Petitioner nevertheless asks this Court to create an implied exception to this rule against alienation, and to require involuntary conveyance of pension interests to bankruptcy trustees for the purpose of discharging the claims of creditors. Nothing in the statutory language of ERISA or the Bankruptcy Code, however, suggests that Congress intended that debtors would forfeit the ERISA-mandated protection of their pension benefits when they declare bankruptcy.

A. The literal language and purposes of ERISA compel the interpretation adopted by the court of appeals in this case. Section 206(d)(1) of ERISA provides that pension benefits "may not be assigned or alienated," 29 U.S.C. 1056(d)(1), and trustees who violate this prohibition are subject to suits for damages and equitable relief under ERISA, 29 U.S.C. 1132(a)(3) and (5). The statutory language makes no exception favoring creditors in bankruptcy proceedings, and this Court has already declined to create implied exceptions to ERISA's anti-alienation rule. *Guidry* v. *Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990).

The purpose of ERISA's prohibition on voluntary and involuntary alienation—conserving plan benefits for the beneficiary's retirement—is also fully implicated in the context of bankruptcy proceedings. If the debtor's pension benefits are used to discharge claims of creditors in bankruptcy, they simply will not be available for retirement, and that is the very result Congress sought to avoid.

B. The Bankruptcy Code also provides, consistent with ERISA, that a debtor's beneficial interest in a trust is excluded from the bankruptcy estate whenever "applicable nonbankruptcy law" would otherwise prevent the transfer of that interest. 11 U.S.C. 541(c)(2). The court of appeals correctly held in this case that there is simply no way to read the phrase "applicable nonbankruptcy law" to exclude ERISA's restriction against alienation, or to refer only to "state spendthrift trust law," as petitioner contends. See Pet. App. 15a-16a.

Petitioner's reliance on the legislative history and the language of the exemption section of the Bankruptcy Code for such a restrictive interpretation is misplaced. The legislative history in fact demonstrates a congressional intent to recodify the rule adopted under the prior Bankruptcy Act, which enforced restrictions on alienation that were recognized under either state or federal law.

Similarly, the fact that one section establishing an exemption for property otherwise included in the estate, 11 U.S.C. 522(d)(10)(E)(iii), makes reference to qualified ERISA pension plans, is also fully consistent with our interpretation of the Bankruptcy Code. Certain categories of tax-qualified pension plans, those established by governmental entities and churches, are not required to incorporate anti-alienation clauses. 29 U.S.C. 1003(b)(1);

26 C.F.R. 1.401(a)-13(a). Such plans accordingly would not be excluded from the bankruptcy estate under "applicable nonbankruptcy laws" within the meaning of Section 541(c)(2). The exemption set forth in Section 522(d) therefore serves to enlarge the protections afforded to such plans, thereby demonstrating that the section is not partially superfluous.

C. The court of appeals' interpretation reconciles coordinate federal statutes without undermining the purposes of either law. Adoption of petitioner's restrictive reading, in contrast, would defeat ERISA's command that claims of creditors must always be subordinated to the debtor's need for pension benefits at the time of retirement. It would also defeat congressional intent to establish a uniform federal rule governing the alienation of ERISA plan benefits, since protection of those benefits would depend upon whether state law happened to make the anti-alienation provision enforceable. In the end, petitioner would have this Court conclude that Congress sought to give pension benefits held in an ERISA qualified trust less protection than pension benefits held in a state spendthrift trust. There is no reason whatsoever to adopt such a strained interpretation of the law.

ARGUMENT

THE TERMS OF ERISA AND THE FEDERAL BANKRUPTCY CODE SHIELD RESPONDENT'S PENSION BENEFITS FROM BANKRUPTCY CREDITORS

The dispositive question in this case is whether ERISA's prohibition against the assignment or alienation of pension benefits, 29 U.S.C. 1056(d)(1), must be honored in bankruptcy proceedings. The Bankruptcy Code provides that "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title," 11 U.S.C. 541(c)(2), and the court of appeals concluded that ERISA is "applicable nonbankruptcy law." It accordingly held that respondent's pension benefits are excluded from his bankruptcy estate. Accord *Velis* v. *Kardanis*, 949 F.2d 78 (3d Cir. 1991); *Forbes* v. *Lucas*, 924 F.2d 597 (6th Cir.), cert. denied, 111 S. Ct. 2275 (1991); *Gladwell* v. *Harline*, 950 F.2d 669 (10th Cir. 1991).

Petitioner, the trustee of respondent's bankruptcy estate, urges this Court to reject the court of appeals' straightforward interpretation of ERISA and the Bankruptcy Code, and to instead read the phrase "applicable nonbankruptcy law" to refer solely to state spendthrift trust law. Br. 49. That interpretation was first advanced in *Goff* v. *Taylor*, 706 F.2d 574 (5th Cir. 1983). Accord *Samore* v. *Graham*, 726 F.2d 1268 (8th Cir. 1984), *Daniel* v. *Security Pacific National Bank*, 771 F.2d 1352 (9th Cir. 1985), cert. denied, 475 U.S. 1016 (1986), and *Lichstrahl* v. *Bankers Trust*, 750 F.2d 1488 (11th Cir. 1985). See also *Regan* v. *Ross*, 691 F.2d 81, 85 (2d Cir. 1982). The United States agrees with the court below that the *Goff* interpretation is inconsistent with the literal language of ERISA as well as the Bankruptcy Code, and would nullify central terms of ERISA's scheme to protect pension plan benefits.

A. ERISA's Anti-Alienation Rule Is An Enforceable Restriction On The Transfer Of Pension Benefits And Does Not Make Any Exception For Bankruptcy Proceedings

1. The literal terms of ERISA do not permit the trustee of a pension plan to transfer or assign plan benefits to a bankruptcy trustee. A beneficiary's interest in a pension plan is generally subject to transfer restrictions by virtue of Section 206(d)(1) of ERISA, 29 U.S.C. 1056(d)(1), which provides that "[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated." [3] The coordinate section of the Internal Revenue Code provides as a general rule that "[a] trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated." 26 U.S.C. 401(a)(13) (ERISA § 1021(c)). In addition, the Treasury Department has promulgated a regulation, 26 C.F.R. 1.401(a)-13(b)(1), specifying that pension benefits held in trust are not subject to various kinds of attachment by creditors.[4]

[3] Section 206(d)(1) is part of Title I of ERISA, which governs "protection of employee benefit rights." A number of types of employee benefit plans are excepted from coverage under Title I of ERISA, including "governmental plan[s]" and "church plan[s]." 29 U.S.C. 1003(b)(1) and (2); see 29 U.S.C. 1002(32) and 1002(33) (defining "governmental plan" and "church plan"). Accordingly, pension plans sponsored by government agencies and churches are not required to include anti-alienation clauses.

[4] The regulation states that "[a] trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process." 26 C.F.R. 1.401(a)-13(b)(1). In light of the statutory exclusion of governmental plans and church plans from coverage under Title I of ERISA, the regulation provides that it does not apply to such plans. *Id.* § 1.401(a)-13(a). The regulation also permits alienation to satisfy a federal tax levy under Section 6331 of the Internal Revenue Code or a judgment in favor of the United States resulting from an unpaid tax assessment. *Id.* § 1.401(a)-13(b)(2).

ERISA requires plan trustees to adhere to these anti-alienation provisions. Under 29 U.S.C. 1104(a)(1)(D), the plan trustee must discharge his duties "in accordance with the documents and instruments governing the plan," and is subject to suit for any violation of the anti-alienation rule. The Secretary of Labor, a plan participant or beneficiary, or a plan fiduciary may bring a civil action to enjoin any violation of the anti-alienation requirement, to recover benefits due under a plan, and to seek reimbursement for the plan from fiduciaries who violated the requirements of the statute or the terms of a plan by alienating benefits held in trust. See 29 U.S.C. 1132(a)(3) and (5).[5]

It has therefore been firmly established outside the bankruptcy context that general creditors—even those who have been criminally wronged by the debtor—may not reach pension benefits properly held in trust by a pension fund containing an anti-alienation provision mandated by ERISA. *Guidry* v. *Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990). See also *Smith* v. *Mirman*, 749 F.2d 181, 183 (4th Cir. 1984) (an employee's accrued benefits under a qualified plan may not be reached by judicial process in aid of a third party

[5] In addition, the IRS has taken the position that the transfer of a beneficiary's interest in a pension plan to a bankruptcy trustee would disqualify the plan from taking advantage of the preferential tax treatment available under ERISA. See *Forbes* v. *Lucas*, 924 F.2d 597, 603 (6th Cir.), cert. denied, 111 S. Ct. 2275 (1991); *Anderson* v. *Raine (In re Moore)*, 907 F.2d 1476, 1481 (4th Cir. 1990); *McLean* v. *Central States, Southeast & Southwest Areas Pension Fund*, 762 F.2d 1204, 1206 (4th Cir. 1985). However, the IRS has refrained from disqualifying plans on that basis in light of the conflict as to whether pension benefits are excluded from the bankruptcy estate under 11 U.S.C. 541(c)(2). The IRS may continue to exercise its enforcement discretion in that manner in circuits that have rejected the Service's position on the question presented in this case pending resolution of the conflict by this Court.

creditor); *Tenneco, Inc.* v. *First Virginia Bank*, 698 F.2d 688, 689-690 (4th Cir. 1983); *General Motors Corp.* v. *Buha*, 623 F.2d 455, 463 (6th Cir. 1980) (pension plan benefits protected against garnishment by tort judgment creditor). There is no reason to apply a different rule here, because none of the provisions governing alienation of ERISA plan benefits includes any exception that would permit alienation in favor of a bankruptcy trustee. The literal language of ERISA therefore serves to bar the trustee of an ERISA plan from making the transfer sought by the petitioner in this case.

2. The purposes of ERISA's anti-alienation provisions apply with full force in the context of bankruptcy. ERISA's restriction on alienation protects vested benefits from both voluntary and involuntary encroachments and ensures that an employee's accrued pension benefits will actually be available for retirement. As this Court has noted on a number of occasions, Congress passed ERISA to guarantee that "if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it." *Nachman Corp.* v. *Pension Benefit Guaranty Corp.*, 446 U.S. 359, 375 (1980). See also *Pension Benefit Guaranty Corp.* v. *R.A. Gray & Co.*, 467 U.S. 717, 720 (1984); *Connolly* v. *Pension Benefit Guaranty Corp.*, 475 U.S. 211, 214 (1986). This Court has also stated that ERISA's anti-alienation rule furthers this purpose: "Section 206(d) reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependents, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them." *Guidry* v. *Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990).

It simply makes no difference whether the pension plan trustee alienates pension benefits in favor of a judgment creditor, a lien holder, or a bankruptcy trustee. The result is the same—the benefits will not be available to the employee at the time of his retirement. And that is the result Congress sought to prevent through adoption of a broad anti-alienation clause.

3. This Court has already refused to create implied exceptions to ERISA's anti-alienation rule. Instead, this Court held in *Guidry* that "[i]f exceptions to this policy are to be made, it is for Congress to undertake that task." *Guidry*, 493 U.S. at 376.[6] In *Guidry*, this Court held that ERISA's anti-alienation provision shields plan benefits from creditors even where the equities strongly favor the creditor, and even where another federal statute arguably provides a basis for an exception to ERISA's anti-alienation rule. Noting that where Congress intended to create exceptions to ERISA's bar against the alienation of pension benefits it has very explicitly done so within ERISA itself, this Court declined to create an equitable exception to ERISA's rule against alienation. 493 U.S. at 376; see *Mackey* v. *Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 838 (1988).[7]

The argument rejected by this Court in *Guidry* has substantial parallels to petitioner's argument in this case. Guidry, a union official and a trustee of the union's pension fund, pleaded guilty to embezzling union funds in violation of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. 501. The union therefore sought to impose a constructive trust on Guidry's pension account in order to further the remedial purposes of the LMRDA, which provides a labor organization with

[6] The Court noted, however, that Guidry had not been found to have breached his fiduciary duty to the union pension plan by embezzling from the union, so that the Court was not deciding whether a fiduciary could be ordered to transfer funds from his pension account to other pension accounts as a remedy for such a breach. 493 U.S. at 373-374.

[7] The Court was referring to 29 U.S.C. 1056(d)(3), which provides an express exception to ERISA's anti-alienation rule for satisfaction of qualified domestic relations orders relating to child support and alimony.

a private right of action to recover damages or obtain other appropriate relief from officials who violate the Act. 29 U.S.C. 501(b). This Court rejected that argument, which had been accepted by the lower court, based upon a specific directive from Congress: pension benefits are immune from alienation or assignment. This Court declined to override this directive in the absence of a clear statement from Congress. 493 U.S. at 375-376. As in *Guidry*, no such clear congressional statement can be found in this case.

B. The Bankruptcy Code Gives Effect to the Anti-alienation Provisions of ERISA

1. Section 541(c)(2) of the Bankruptcy Code provides, consistent with ERISA, that trust funds subject to enforceable transfer restrictions are not included in the bankruptcy estate. Section 541(c)(2) provides that "[a] restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title." 11 U.S.C. 541(c)(2). A pension fund that was established in compliance with ERISA is a "trust," see 29 U.S.C. 1103; 26 U.S.C. 401(a), and as shown previously, ERISA's restrictions against alienation are "enforceable" under 29 U.S.C. 1132(a)(3) and (5). Section 541(c)(2)'s reference to "applicable nonbankruptcy law" is unqualified and contains no reference to state law or, more particularly, to state spendthrift trust law. Following this Court's "first canon" of statutory interpretation, a straightforward reading of the phrase "applicable nonbankruptcy law" necessarily encompasses federal as well as state law. *Connecticut Nat'l Bank* v. *Germain*, No. 90-1791 (Mar. 9, 1992), quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981).

Reading Section 541(c)(2) to encompass both federal and state laws is also consistent with the use of the phrase "applicable nonbankruptcy law" in other sections

of the Bankruptcy Code. See *Morrison-Knudsen Construction Co.* v. *Director, OWCP*, 461 U.S. 624, 633 (1983) (recognizing the principle of statutory construction that a word is presumed to have the same meaning in all subsections of the same statute). In numerous places, unless otherwise limited by the text, the term "applicable nonbankruptcy law" refers to federal as well as state law.[8] As the Fourth Circuit noted in *In re Moore*, it would be "incongruous to give the same phrase in § 541(c)(2) a narrower construction than the identical phrase in other parts of the Bankruptcy Code, particularly since the disparate sections of the Bankruptcy Code were enacted together in a single comprehensive statute." 907 F.2d at 1478.

Conversely, other portions of the Bankruptcy Code demonstrate that, when Congress intended to refer exclusively to state law, it did so explicitly. See, *e.g.*, 11 U.S.C. 109(c)(2) (entity may be a debtor under Chapter 9 if authorized "by State law"); 11 U.S.C. 522(b)(1) (election of exemptions controlled by "State law that is applicable to the debtor"); 11 U.S.C. 523(a)(5) (a debt for alimony, maintenance, or support determined "in accordance with state or territorial law" is not dischargeable); 11 U.S.C. 903(1) ("State law prescribing a method of composition of indebtedness" is not binding on nonconsenting creditors); see also 11 U.S.C. 362(b)(12); 11 U.S.C. 1145(a). Accordingly, petitioner's contention that the phrase "applicable nonbankruptcy law" is limited to

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[8] See, *e.g.*, 11 U.S.C. 1125(d) ("otherwise applicable nonbankruptcy law" includes federal securities law), see *In re The Stanley Hotel, Inc.*, 13 B.R. 926, 931 (Bankr. D. Colo. 1981); 11 U.S.C. 108(a) ("applicable nonbankruptcy law" includes, *inter alia*, the Racketeer Influenced and Corrupt Organization Act and the Interstate Commerce Act), see *In re Ahead By a Length, Inc.*, 100 B.R. 157, 162-163 (Bankr. S.D.N.Y. 1989), and *Motor Carrier Audit & Collection Co.* v. *Lighting Products, Inc.*, 113 B.R. 424, 425-426 (N.D. Ill. 1989); 11 U.S.C. 108(b) ("applicable nonbankruptcy law" includes the Federal Tort Claims Act), see *Eagle-Picher Industries, Inc.* v. *United States*, 937 F.2d 625, 639-640 (D.C. Cir. 1991).

state spendthrift trust law is unsupported by the language of Section 541(c)(2), which neither states nor implies any such limitation.[9]

2. Petitioner, and the courts that have limited "applicable nonbankruptcy law" to state spendthrift trust law, have purported to rely on the legislative history of Section 541(c)(2). See Br. 38-42; *Goff*, 706 F.2d at 581-582; *Graham*, 726 F.2d at 1271-1272. As an initial matter, resort to the legislative history is improper where the statute is not ambiguous. *Connecticut Nat'l Bank* v. *Germain*, No. 90-1791 (Mar. 9, 1992), slip op. 5. But even if it were proper to advert to the legislative history, the limited history pertaining to Section 541(c)(2) is more consistent with the statutory interpretation adopted by the court of appeals in this case.

a. The House Report stated that the term "applicable nonbankrupcy law" in Section 541(c)(2) "preserves restrictions on transfer of a spendthrift trust to the extent that the restriction is enforceable under applicable nonbankruptcy law," and added that Section 541(c)(2) "continues over the exclusion from property of the estate of the debtor's interest in a spendthrift trust to the extent the trust is protected from creditors under applicable State law." H.R. Rep. No. 595, 95th Cong., 1st Sess. 369, 176 (1977). The Senate Report similarly noted that Section 541(c)(2) "preserves restrictions on a transfer of a spendthrift trust." S. Rep. No. 989, 95th Cong., 2d Sess. 83 (1978). Those passages indicate Congress's intent to protect spendthrift trusts, and other passages in legislative history pertaining to ERISA reveal that Congress in fact has equated the ERISA anti-alienation requirement with a "spendthrift" clause.[10] Moreover, these passages should not be read to limit the scope of "applicable nonbankruptcy law" merely because they illustrate congressional intent by pointing to a common example—spendthrift trusts that are enforceable under state law.

[9] Petitioner's observation (Br. 35) that in Bankruptcy Code Section 522(b)(2)(B) the phrase "applicable nonbankruptcy law" is effectively restricted to state law does not advance his position. The reference in Section 522(b)(2)(B) is effectively limited to state law because the phrase is qualified by a reference to the law pertaining to tenancies by the entireties and there is no similar language in Section 541(c)(2) restricting "applicable nonbankruptcy law" to state law, much less state spendthrift trust law.

b. The legislative history also shows that Congress intended Section 541(c)(2) to preserve prior law with respect to restrictions on alienability and assignment. Prior law would have protected the pension plan interests in issue, providing further support for the lower court's construction of Section 541(c)(2).

Prior to the adoption of Section 541(c)(2), interests protected by an enforceable anti-alienation provision were excluded from the bankruptcy estate under Section 70a of the Bankruptcy Act. 11 U.S.C. 110(a) (1976). See *Danning* v. *Lederer*, 232 F.2d 610 (7th Cir. 1956); *Jones* v. *Harrison*, 7 F.2d 461 (8th Cir. 1925), cert. denied, 270 U.S. 652 (1926). In addition, restrictions on alienation were respected by Section 70a whether they were enforceable under state spendthrift trust law or federal law. 4A *Collier on Bankruptcy* para. 70.26, at 365-366 (14th ed. 1978). Thus, for example, the "headright" of an Osage Indian—*i.e.*, oil and gas rights held in trust by the United States—did not become property of the Indian's bankruptcy estate because federal law imposed restrictions on transfer and seizure of those assets. *Taylor* v. *Tayrien*, 51 F.2d 884 (10th Cir.), cert. denied, 284 U.S. 672 (1931).[11]

[10] In Section 204(a) of the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426, Congress amended Internal Revenue Code Section 401(a)(13) to exempt a "qualified domestic relations order" from ERISA's restrictions on alienation of benefits. 98 Stat. 1445. In the technical explanation which accompanied the Act, the Senate Committee on Finance specifically referred to the anti-alienation provision of Section 401(a)(13) of the Internal Revenue Code and to the parallel provision in Section 206(d)(1) of ERISA as "spendthrift provisions." 130 Cong. Rec. 22,126-22,127 (1984).

[11] After enactment of the current Bankruptcy Code, but in cases decided under the former Act, a few courts also had occasion to

The history leading to the adoption of the current law reveals a congressional intent to leave these rules undisturbed. The Commission on Bankruptcy Laws, established in 1970 to study the former Bankruptcy Act, proposed a modification of the spendthrift trust rules that was ultimately rejected in favor of the prior law. The Commission recommended that restrictions on a debtor's beneficial trust interests that were "enforceable under applicable nonbankruptcy law" should only be enforceable in bankruptcy to the extent reasonably necessary for support of the debtor and his dependents. *Report of the Commission of the Bankruptcy Laws of the United States*, H.R. Doc. No. 137, 93d Cong., 1st Sess. Pt. 1, at 197 (1973). *Id.* Pt. 2, § 4-601(b), at 147-148. The House version of the bill that was ultimately enacted as the new Bankruptcy Code did not adopt this aspect of the Commission's recommendation. The law adopted did not limit the exclusion of protected trust interests to the amount necessary for support. See H.R. Rep. No. 595, *supra*, at 176, 369; S. Rep. No. 989, *supra*, at 83. Thus, it is clear that Bankruptcy Code Section 541(c)(2) was intended to continue *in full* the protection of interests in spendthrift trusts that was available under the prior Bankruptcy Act.

3. Petitioner and the courts that have restricted "applicable nonbankruptcy law" to state spendthrift trust law have also relied on the misimpression that reading Section 541(c)(2) to mean what it says would render one of the Bankruptcy Code's exemption provisions, 11 U.S.C. 522(d)(10)(E)(iii), partially superfluous. See Br. 24-33; *Goff*, 706 F.2d at 582; *Heitkamp* v. *Dyke*, 943 F.2d 1435, 1442-1443 & n.20 (5th Cir. 1991); cf. *Regan* v. *Ross*, 691 F.2d 81 (2d Cir. 1982). In fact, there is no

consider, and recognize, interests in pension plans subject to ERISA as interests that were outside the scope of the bankruptcy estate. See *Turpin* v. *Wente*, 644 F.2d 472 (5th Cir. 1981); *Mason* v. *Eastman Kodak Co. (In re Parker)*, 473 F. Supp. 746 (W.D.N.Y. 1979). But see *Judson* v. *Witlin*, 640 F.2d 661 (5th Cir. 1981).

reason to depart from the language Congress used in order to avoid a conflict between the exclusion and exemption provisions, because each provision has force when read together properly.

a. The Bankruptcy Code provides that certain property includable in the bankruptcy estate under Section 541 may be exempted from the estate pursuant to a complex set of provisions detailed in Section 522. In some States, debtors may choose between two different lists of exemptions: (1) the exemptions referred to as the "laundry list," set forth in Section 522(d); or (2) the exemptions available under Section 522(b).[12] In the majority of States, including Virginia, which is respondent's residence, debtors may not elect the exemptions set out in the laundry list under Section 522(d), but are restricted to the exemptions allowed under Section 522(b). See 11 U.S.C. 522(b)(1); Va. Code Ann. § 34-31 (Michie 1986); 3 *Collier on Bankruptcy para.* 522.02 n.4a (15th ed. 1991).

Even though the laundry list of exemptions under 522(d) is not applicable to most bankruptcies—including respondent's—petitioner claims (Br. 26) that the terms of Section 522(d) disclose an intent to make all ERISA benefits includable in the estate. Section 522(d)(10)(E) provides that a debtor who chooses the laundry list of exemptions (if allowed to do so under state law), may exempt his right to receive "a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract * * *, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless— * * * (iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1986 (26 U.S.C. 401(a), 403(a), 403(b), 408, or 409)." If interests in qualified pension plans are excluded from the bankruptcy estate under

[12] Section 522(b)(2)(A) provides for the exemption of "any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law."

Section 541(c)(2), petitioner contends, there would be no need for a reference to pension plans that qualify for preferential tax treatment under Section 401(a) of the Internal Revenue Code in the Bankruptcy Code's exemption provision. See Br. 29-31.

It should be noted at the outset that plans that qualify for preferential tax treatment under Section 408—individual retirement accounts (IRAs)—are not required to contain anti-alienation provisions.[13] An IRA therefore would not be protected from alienation under "applicable nonbankruptcy law," but the exemption in Section 522(d) would nevertheless serve to *enlarge* the protection afforded to the IRA assets when the debtor declares bankruptcy. It would be counter-intuitive to read Section 522(d), which provides increased protection for plans that are not required to contain an anti-alienation clause, to *reduce* the protection afforded to the plans that Congress required to be protected from assignment or alienation.

Moreover, even the Section's reference to pension plans that qualify under Section 401(a) does not render the section partially superfluous. Not all pension plans that qualify for favorable tax treatment under Section 401(a) contain an anti-alienation provision, and the exemption of 522(d) would therefore serve to enlarge the protection afforded those plans as well. See *Tatge* v. *Cheaver* (*In re Cheaver*), 121 B.R. 665, 665-666 (Bankr. D.D.C. 1990); Seiden, *Chapter 7 Cases: Do ERISA and the Bankruptcy Code Conflict as to Whether a Debtor's Interest in or Rights Under a Qualified Plan Can be Used to Pay Claims?*, 61 Am. Bankr. L.J. 301, 317-318 (1987); Arnopol, *Including Retirement Benefits in a Debtor's Bankruptcy Estate: A Proposal for Harmonizing ERISA and the Bankruptcy Code*, 56 Mo. L. Rev. 491, 552-553 (1991). As noted previously (see notes 3, 4, *supra*), two significant categories of pension plans, those established by governmental entities and churches, may qualify for preferential tax treatment without complying with ERISA's anti-alienation requirement. See 29 U.S.C. 1003(b)(1) and (2); 26 C.F.R. 1.401(a)-13(a).[14] In short, since these pension plans qualify for favorable tax treatment under Section 401(a) of the Internal Revenue Code but are not protected against alienation under "applicable nonbankruptcy law," the court of appeals' interpretation of Section 541(c)(2) does not partially nullify Section 522(d)(10)(e)(iii). Rather, under the court of appeals' construction of the statute, Section 522(d)(10)(e)(iii) increases the protections afforded to participants in governmental plans and church plans.

b. Unlike petitioner, amicus David B. Tatge, Trustee, recognizes that some types of ERISA pension plans are not required to include anti-alienation clauses. He nevertheless contends that the court of appeals' interpretation is contrary to various shreds of legislative history bearing on Congress's intent in enacting Section 522(d)(10)(E).

Amicus relies primarily on a note explaining the exemption provision in the proposal of the Commission on the Bankruptcy Laws. Br. 10-11, quoting Note 8 to

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[13] Pension plans that qualify for preferential tax treatment under 26 U.S.C. 408 (individual retirement accounts) and 409 (which covered retirement bonds at the time the Bankruptcy Code was enacted) are specifically excepted from ERISA's anti-alienation requirement by 29 U.S.C. 1051(6).

[14] Because the provisions of Subchapter I of ERISA do not apply to governmental plans and church plans, they are treated differently from plans established by private companies in a number of respects. For example, in addition to not being subject to the anti-alienation rule, governmental plans and church plans are not required to comply with ERISA's reporting and disclosure requirements or the statute's vesting and participation requirements. Governmental plans and church plans are excepted from these requirements whether they establish a trust fund or purchase annuity contracts, as provided in 26 U.S.C. 403. See 26 U.S.C. 410(c)(1)(A) and (B), 411(e)(1)(A) and (B); see also *Feinstein* v. *Lewis*, 477 F. Supp. 1256, 1261 (S.D.N.Y. 1979) ("[p]lans established by state and local governments are generally excluded from coverage under ERISA because of concerns of federalism").

§ 4-503 of the Commission Report. That note supports the view that the drafter thought that interests in qualified plans sponsored by private companies would be partially exempted from the bankruptcy estate. Putting aside the question whether it would be proper to rewrite Section 541(c)(2) based upon the explanatory note to a Commission proposal, there is no reason to impute the drafter's intention to Congress because Congress in fact revised the Commission's proposal in material respects.[15]

Amicus also notes that a witness at a hearing on the Commission's proposal stated that the Commission's bill allowed a partial exemption for pension benefits, whereas ERISA precluded any alienation of pension benefits. Br. 12, quoting *Hearings on S. 235 and 236 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary,* 94th Cong., 1st Sess. 664, 678 (1975) (statement of John Creedon of the American Life Insurance Association). Perhaps that testimony prompted Congress to resolve the conflict between the Commission's proposal and ERISA by excluding pension benefits subject to a mandatory anti-alienation clause altogether. In any event, as enacted, Section 541(c)(2) and Section 522(d)(10)(E) are fully compatible with each other and with ERISA's anti-alienation provision.

c. The court of appeals properly rejected petitioner's argument even though it may not have appreciated that Section 541(c)(2) and Section 522(d)(10)(E) are fully

[15] The Commission proposed in § 4-601(b) to exclude interests of the debtor "in a trust created for his support." A pension trust, which might have been created before a participant was employed by the sponsoring company, would not normally have been created for the debtor's support. Therefore, under the Commission's proposal, pension benefits would have been subject to partial exemption but not exclusion. However, Congress deleted "created for his support" from the Commission's proposal and broadly excluded property held "in a trust" in Section 541(c)(2), so the law actually adopted does exclude pension benefits.

compatible. The Bankruptcy Code is not a model of precise draftsmanship, *Dewsnup* v. *Timm*, 112 S. Ct. 773, 778 (1992), and the Code's exemption provision is particularly complex. In a recent decision, this Court refused to depart from the clear language of 28 U.S.C. 158(d), which governs appellate jurisdiction in bankruptcy cases, based upon an overlap between Section 158(d) and 28 U.S.C. 1291, which governs appellate jurisdiction generally. *Connecticut Nat'l Bank* v. *Germain*, No. 90-1791 (Mar. 9, 1992).

In reasoning applicable to this case, the Court said that "[b]ecause giving effect to both §§ 1291 and 158(d) would not render one or the other wholly superfluous, we do not have to read § 158(d) as precluding courts of appeals, by negative implication, from exercising jurisdiction under § 1291 over district courts sitting in bankruptcy." *Connecticut Nat'l Bank*, slip op. 4-5. Under no reading of the Bankruptcy Code is either Section 541(c)(2) or Section 522(d)(10)(E) rendered wholly superfluous, since there is no dispute that Section 522(d)(10)(E) exempts interests in pension plans that do not qualify for preferential tax treatment in some circumstances. Accordingly, even a partial overlap between Section 541(c)(2) and Section 522(d)(10)(E) would not provide an adequate basis to read "applicable nonbankruptcy law" to mean "state spendthrift trust law." But as we have explained, Section 541(c)(2) and Section 522(d)(10)(E) are nevertheless entirely compatible.[16]

[16] In this connection, we note that the Third Circuit did not adequately harmonize Section 541(c)(2) and Section 522(d)(10)(E) by reading the latter provision as relating only to distributions from a pension plan that the debtor has an immediate and present right to receive. See *Velis* v. *Kardanis*, 949 F.2d at 81-82. Even assuming that Section 522(d)(10)(E) can be read to protect distributions only, such a reading does not resolve the present issue. In our view, Section 541(c)(2) excludes from the bankruptcy estate the debtor's interest in a plan containing an anti-alienation clause mandated by ERISA; once the interest in the plan is excluded, distributions

4. If this Court agrees that respondent's pension benefits are excluded from his bankruptcy estate because the Pension Plan was subject to ERISA's anti-alienation rule, there is no need to consider whether those benefits are exempt under Section 522(b)(2)(A), which provides an exemption for "property that is exempt under Federal law, other than subsection (d) of this section." But it is instructive that the district court's conclusion that interests in pension plans are not "exempt under Federal law" rested on the fact that ERISA was not mentioned in the legislative history of Section 522(b). Pet. App. 44a; see S. Rep. No. 989, 95th Cong., 2d Sess. 75 (1978), H.R. Rep. No. 595, 95th Cong., 1st Sess. 360 (1977); see also *Lichstrahl*, 750 F.2d at 1491; *Graham*, 726 F.2d at 1274.[17] If we are correct that interests in

under the plan are excluded as well and constitute part of the debtor's "fresh start" because, with a few exceptions not applicable in this Chapter 7 case, only interests of the debtor in property as of "the commencement of the case" go into the bankruptcy estate. 11 U.S.C. 541(a)(1). Thus, since respondent's interest in the Pension Plan is not included in his estate under Section 541(c)(2), there is no need to exempt distributions under the Plan that occurred after the filing of his bankruptcy petition.

Even in Chapters 12 and 13, where property of the estate includes property received by the debtor during the pendency of the case, Section 522(d)(10)(E) would not be necessary to protect distributions. Debtors in Chapters 12 and 13 are required only to commit their "disposable income," *i.e.*, amounts in excess of that which is "reasonably necessary * * * for the maintenance or support of the debtor or a dependent of the debtor," 11 U.S.C. 1225(b), 1325(b), and Section 522(d)(10)(E) by its terms provides an exemption only "to the extent reasonably necessary for the support of the debtor and any dependent of the debtor."

[17] As an example of the sort of property that is "exempt under Federal law" other than Section 522(d), the reports mentioned homestead land protected by 43 U.S.C. 175 (1976), which provided that "[n]o lands acquired under the provisions of the homestead laws * * * shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor." The other examples provided in the legislative history of Section 522 include some types of benefits that are protected by strong anti-

plans subject to ERISA's anti-alienation provision generally are excluded from the bankruptcy estate, there was simply no pressing need to list ERISA in the legislative history of Section 522. On the other hand, if we are wrong about the meaning of Section 541(c)(2), Congress's failure to mention ERISA in the legislative history of Section 522 still does not provide an adequate basis to conclude that ERISA is not "Federal law." ERISA most definitely is a federal law. *In re Komet*, 104 B.R. 799, 808 (Bankr. W.D. Tex. 1989).

C. Excluding Respondent's Pension Benefits From His Bankruptcy Estate Harmonizes ERISA And The Bankruptcy Code

As the court of appeals stated, Pet. App. 16a, citing *Morton* v. *Mancari*, 417 U.S. 535 (1974), coordinate federal statutes should be read in harmony whenever possible. Indeed, when two federal statutes are capable of co-existence, it is the affirmative duty of the courts, absent clear direction to the contrary, to interpret the statutes so as to give effect to both. *Id.* at 551. Applying Bankruptcy Code Section 541(c)(2) according to its terms (and, thus, to exclude from the bankruptcy estate a debtor's interest in a pension plan that contains an anti-alienation clause mandated by ERISA) avoids a significant inroad on Congress's goal, manifest in Section 206(d)(1) of ERISA, of preserving retirement benefits from the demands of a participant's creditors. Thus, the court of appeals' decision in this case interprets

alienation provisions, such as the provision prohibiting the alienation of benefits payable under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 916. However, although such benefits are protected by an anti-alienation provision, they are not held in trust, and would not be excluded from the bankruptcy estate pursuant to Section 541(c)(2) under our interpretation of that provision because it applies only to benefits held "in a trust."

ERISA's anti-alienation provision and the Bankruptcy Code in a manner that gives effect to both.[18]

On the other hand, petitioner's interpretation of Bankruptcy Code Section 541(c)(2) would nullify ERISA's anti-alienation provisions in situations where a pension plan did not meet state law requirements for a spendthrift trust. Petitioner's interpretation thus leads to the incongruous result that pension benefits subject to ERISA's anti-alienation rule are fully protected from creditors until the filing of a bankruptcy petition in federal court, at which time their protection becomes dependent on state law. See *John Hancock Mutual Life Insurance Co.* v. *Watson (In re Kincaid)*, 917 F.2d 1162, 1169-1170 (9th Cir. 1990) (Fletcher, J. concurring). Petitioner's interpretation thus creates an incentive for creditors to force debtors into involuntary bankruptcy proceedings in order to reach pension funds that otherwise would be protected. See *In re Moore*, 907 F.2d at 1480; *Gladwell*, 950 F.2d at 675. Furthermore, because petitioner's interpretation makes the application of ERISA's anti-alienation provision dependent on state law, it is contrary to ERISA's broader purpose of ensuring uniform treatment of pension plans throughout the country. See *Fort Halifax Packing Co.* v. *Coyne*, 482 U.S. 1, 9 (1987).

An interpretation of one federal statute that so undercuts another is to be avoided, unless that is the clear intent of Congress. Such intent is not evident here, either in the Bankruptcy Code or in ERISA. By contrast, the natural reading of Section 541(c)(2) endorsed by the

[18] Contrary to petitioner's suggestion, Br. 15, 16, 20, 42-46, ERISA's preemption provision affords little guidance with respect to the proper resolution of the question presented in this case. Section 514(d) of ERISA, 29 U.S.C. 1144(d), provides that "[n]othing in this [Act] shall be construed to alter, amend, invalidate, impair, or supersede any law of the United States." But that merely begs the question: if "applicable nonbankruptcy law" includes ERISA, then ERISA does not interfere with the Bankruptcy Code.

court of appeals in this case avoids differential treatment of participants in pension plans containing the anti-alienation clause mandated by ERISA and gives force to such clauses.

As a frequent creditor in bankruptcy proceedings, the United States is not unmindful of the apparent unfairness of discharging debtors from their obligations while allowing the debtors to retain substantial assets.[19] However, this Court has already declined, under more compelling circumstances than those presented by the filing of a petition in bankruptcy, to carve out an equitable exception to ERISA's anti-alienation provision. See *Guidry*, 493 U.S. at 376. As this Court recognized, the imposition of safeguards against potential abuse of the bankruptcy forum is a task more properly undertaken directly by Congress.[20]

[19] It is possible for a debtor to build up a substantial interest in a pension plan that is subject to ERISA. However, it is not possible for a debtor quickly to transfer substantial assets into a pension plan in anticipation of bankruptcy because ERISA restricts the amounts that may be contributed annually to an individual's account. See, *e.g.*, 26 U.S.C. 415(c)(1).

[20] At present, several bills have been introduced to clarify this question. *E.g.*, S. 1985, 102d Cong., 2d Sess. § 202 (1992) (adding a third paragraph to Section 541(c) explicitly excluding from the estate "any rights of debtor" to various qualified plans).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

11 U.S.C. 522 provides in pertinent part:

* * * * *

(b) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate * * *

(2)(A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days imediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place * * *.

* * * * *

(d) The following property may be exempted under subsection (b)(1) of this section:

* * * * *

(10) The debtor's right to receive—

* * * * *

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless—

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), 408, or 409 of the Internal Revenue Code of 1954 (26 U.S.C. 401(a), 403(a), 403(b), 408, or 409).

11 U.S.C. 541(c)(2) provides:

A restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable nonbankruptcy law is enforceable in a case under this title.

26 U.S.C. 401(a)(13) provides in pertinent part:

Assignment and alienation.—

(A) In general.—A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. For purposes of the preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment made by any participant who is receiving benefits under the plan unless the assignment or alienation is made for purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 (relating to tax on prohibited transactions) by reason of section 4975(d)(1). This paragraph shall take effect on January 1, 1976 and shall not apply to assignments which were irrevocable on September 2, 1974.

(B) Special rules for domestic relations orders.—Subparagraph (A) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that subparagraph (A) shall not apply if the order is determined to be a qualified domestic relations order.

29 U.S.C. 1003(b) provides in pertinent part:

The provisions of this subchapter shall not apply to any employee benefit plan if—

(1) such plan is a governmental plan (as defined in section 1002(32) of this title);

(2) such plan is a church plan (as defined in section 1002(33) of this title) with respect to which no election has been made under section 410(d) of Title 26 * * *.

29 U.S.C. 1051 provides in pertinent part:

* * * * *

This part shall apply to any employee benefit plan described in section 1003(a) of this title (and not exempted under section 1003(b) of this title) other than—

* * * * *

(6) an individual retirement account or annuity described in section 408 of Title 26, or a retirement bond described in section 409 of Title 26 (as effective for obligations issued before January 1, 1984) * * *.

29 U.S.C. 1056(d) provides in pertinent part:

(1) Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.

(2) For the purposes of paragraph (1) of this subsection, there shall not be taken into account any

voluntary and revocable assignment of not to exceed 10 percent of any benefit payment, or of any irrevocable assignment or alienation of benefits executed before September 2, 1974. The preceeding sentence shall not apply to any assignment or alienation made for the purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 of Title 26 (relating to tax on prohibited transactions) by reason of section 4975(d)(1) of Title 26.

(3)(A) Paragraph (1) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that paragraph (1) shall not apply if the order is determined to be a qualified domestic relations order. Each pension plan shall provide for the payment of benefits in accordance with the applicable requirements of any qualified domestic relations order.

26 C.F.R. 1.401(a)-13 provides in pertinent part:

(a) *Scope of the regulations.* This section applies only to plans to which section 411 applies without regard to section 411(e)(2). Thus, for example, it does not apply to a governmental plan, within the meaning of section 414(d); a church plan, within the meaning of section 414(e), for which there has not been made the election under section 410(a) to have the participation, vesting, funding, etc. requirements apply; or a plan which at no time after September 2, 1974, provided for employer contributions.

(b) *No assignment or alienation*—(1) *General rule.* Under section 401(a)(13), a trust will not be qualified unless the plan of which the trust is a

part provides that benefits provided under the plan may not be anticipated, assigned (either at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process.

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